

BOARD OF APPEALS CASE NO. 4898

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BEFORE THE

APPLICANT: E. B. Abel, Jr.

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ZONING HEARING EXAMINER

**REQUEST: Special Exceptions and
variances to operate a golf/swim/tennis/
country club and resort/hotel/conference
center in the AG and R2 Districts;
1620 Chapel Road, Havre de Grace
HEARING DATE: April 21, 1999**

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 3/10/99 & 3/17/99

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Record: 3/12/99 & 3/19/99

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ZONING HEARING EXAMINER'S DECISION

The Applicant, E. B. Abel, Jr. filed an application requesting the following relief from the Harford County Code:

1. A special exception pursuant to Section 267-53(A)(2) to operate a country club, golf club, tennis and swim club use, including accessories.
2. A special exception pursuant to Section 267-53(F)(5) to operate a resort, including hotel and conference center.
3. A variance from Section 267-34(C), Table II, to allow the minimum use or building setback to be less than fifty feet from an adjacent residential lot.
4. A variance from Section 267-41(D)(2)(c) to disturb the natural resource district area for stream protection within 150 feet on both sides of the center line of a stream or 50 feet beyond the one hundred year floodplain, whichever is greater, and along their tributary for a minimum of 75 feet on both sides of the center line of the tributary.
5. A variance from Section 267-41(D)(4)(b) and (5)(b) to enable a buffer along streams to be less than 50 feet plus four feet for each one percent increase in slope measured from the water's edge, zero feet proposed.
6. A variance from Section 267-41(D)(6) and (5)(e) to disturb non-tidal wetlands and to disturb the 75-foot non-tidal wetlands buffer, zero feet proposed, in the Agricultural and R2 Urban Residential Districts.

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The subject parcel is located at 1620 Chapel Road in the Sixth Election District and is and is more particularly identified on Tax Map 44, Grid 3D, Parcel Nos. 236 and 702. The subject property contains 300.88 acres, more or less, and is zoned AG, Agricultural and R2, Urban Residential District. Parcel No. 236 is owned by Blenheim, LLC, Abel Ventures, LLC and Abel Resorts, LLC. Parcel No. 702 is owned by Harford County, Maryland.

Mr. E. B. Abel, Jr. stated that he is a golf course operator who operates the existing Bulle Rock Golf Course in Havre de Grace. The witness stated that the proposed 18 hole golf course will be of the same caliber as the existing Bulle Rock Golf Course and will be open to the public. This course will also be designed by Pete Dye. He said that future residential development is associated with the project as shown on Exhibit 7 ("Future Residential Area"). However, no specific lot layout has been proposed and the property zoned R2 proposed for future residential development is not the subject of the application.

Mr. Abel testified that he wants to build a 300-room, four-star hotel with a conference center consisting of 40,000 square feet, containing various accessory uses such as a pool, fitness center, restaurant, etc. He is requesting approval of two different site plans, one which has access to MD Route 155 and the other which has access to U.S. Route 40. In all other respects, these two site plans are virtually identical. The clubhouse will be built in the existing Weber mansion which will be refurbished. A golf driving range and practice facility will also be constructed as a part of the new golf course as shown on the site plan (Applicant's Exhibit No. 7).

Mr. Abel testified that approval of the project would not harm anyone in any way and would benefit Harford County by preserving open space and generating economic benefits. Mr. Abel indicated that the denial of the requested variances would cause practical difficulty in that, without the variances, the golf course, as designed by Mr. Dye, could not be built. Mr. Abel agreed to the imposition of all conditions of approval set forth in the Staff Report.

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Next to testify was Frank Hertsch of Morris & Ritchie Associates, Inc., was accepted as an expert civil engineer. Mr. Hertsch stated that water and sewer service for the project would be provided either by Harford County or the City of Havre de Grace. Water to irrigate the golf course would also be provided by the City or the County. Mr. Hertsch testified that a portion of a lot in the Shawnee Brook Subdivision, which constitutes an adjacent residential lot under the Zoning Code, as shown on Exhibit 8, will be less than 50 feet from a portion of the golf course. In the event the Future Residential Area were developed, it would constitute a residential lot or lots located less than 50 feet from the golf course. The witness explained that the golf course design could not be changed to meet the 50-foot setback from the Future Residential Area and the adjoining residential lot without damaging Mr. Dye's design and harming play. No other acceptable design of the golf course could be prepared without the requested variances.

Peter Bergmann of Geo-Technology Associates, Inc., an expert environmental consultant, next testified. Mr. Bergmann indicated that Geo-Technology Associates, Inc. had conducted an environmental assessment and analysis in the case. Mr. Bergmann said that the impacts shown on the site plan were slightly greater than necessary to provide flexibility in final design of the golf course. He said that the final design will reduce impacts as much as possible. Mr. Bergmann said that only two to three acres of wetland resource would actually be filled and there would be no impact to wildlife if the site plan were approved. He said that the project's primary impact to the Natural Resource District was disturbance of the NRD buffers and changing vegetative communities. Approximately 20 acres of forest located within the NRD would be cleared in connection with golf course construction. Mitigation measures, such as creating additional wetlands, would be utilized. He explained that a final mitigation plan to be approved by the Department of Planning and Zoning would be prepared as a condition of approval. Mr. Bergmann pointed out that building the golf course would protect the environment by eliminating agricultural activities currently conducted on the property. He said that agricultural fields can cause erosion and other problems which stabilized turf grass would prevent.

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Mr. Bergmann indicated that he was unable to further reduce the impacts to the NRD except for the reduction which will take place as final design and engineering of the golf course is completed without damaging the design of the golf course prepared by Mr. Dye. Mr. Bergmann testified that in his opinion, disturbance to the NRD as requested by the Applicant would not adversely affect the NRD or impair its purpose.

Mr. Wes Guckert of the Traffic Group, Inc., an expert traffic consultant, next testified. Mr. Guckert analyzed traffic impacts in connection with the Applicant's request for the golf course and resort, including a conference center and hotel. Mr. Guckert indicated that the Applicant was requesting alternative access, i.e., constructing a new public road from existing Barker Lane off Maryland Route 155 to Chapel Road in order to have I-95 access, or to use the existing driveway access to U.S. Route 40. Mr. Guckert stated that his firm took traffic counts to determine levels of existing traffic on the road network. He also contacted the State Highway Administration and projected the traffic that would be generated by a 300-room hotel, conference center and golf course onto the surrounding road network. The witness testified that a final adequate public facilities ordinance traffic study would be performed in connection with the DAC approval process which would follow the granting of the special exception and variances. He indicated that based on his analysis, no adverse traffic impacts would be caused by the project, regardless of which access was used. Mr. Guckert also testified that Route 40 had sufficient capacity to accommodate traffic that would be generated by this project if that access were utilized.

Denis Canavan, an expert land planner, also testified. Mr. Canavan indicated that in his opinion, the proposed hotel and conference center fell within the definition of a resort contained in the Code. He noted that all applicable requirements for the project were met with the exception of the NRD variance and the building or use setback variance from an adjacent residential lot. Mr. Canavan pointed out that the use would be compatible with other uses permitted in the AG and R2 Districts which could cause far more impact than the proposed use. Mr. Canavan further indicated that he had reviewed the "Limitations, Guides and Standards" set forth in Section 267-9(l) of the Code. He stated that he agreed with the staff's analysis of each limitation, guide and standard as set forth in the Staff Report.

Mr. Canavan stated that based on his knowledge, experience and education, the use of

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the property as described by Mr. Abel would not generate any adverse affects significantly different in character or intensity from the effects inherent in the operation of a golf club and accessory uses and the operation of a resort. He pointed out that traffic would not be a problem based on the testimony of Mr. Guckert. The golf course is a low impact use and, with the exception of the adjacent residential lot setback and NRD impacts, all applicable Code requirements were met. Mr. Canavan also said that in his opinion, the subject property was unique in that the portion of the adjacent residential lot in Shawnee Brook which the project adjoined was separated from the rest of the lot by a road and could not be used for residential purposes. He noted that the Future Residential Area has not yet been developed or subdivided and, accordingly, does not yet constitute an adjacent residential lot. Mr. Canavan pointed out that without the requested setback variance, the design of the golf course would be adversely affected. Granting the requested setback variance would not cause any adverse impact of any kind to anyone.

Anthony S. McClune, Chief of Current Planning for the Department of Planning and Zoning, summarized the Staff Report which recommended conditional approval. In particular, he noted that the Department did not object to access to the project from Chapel Road.

Mr. Bill Woodsen of 316 Lockhart Court expressed concerns about impact on wildlife resulting from development of the project. Mr. Woodsen and Henry Burden also expressed concerns regarding forest removal necessary to construct the golf course. By stipulation, Michael E. Leaf, Personal Representative of the Estate of James C. Barker and the Trustee under the Residuary Trust of James C. Barker, was found to have standing.

In response to a question posed by the Hearing Examiner, regarding replacement of the twenty (20) acres of forest to be removed in order to construct the project, Mr. Hertsch testified that there is no room on the golf course site to replace the forest to be removed. He also noted that in an area to be subdivided into lots for homes, forest area does not provide habitats for migratory birds. He explained that the project far exceeds the forest retention requirements set forth in the Code. He noted that trees will be planted in the future residential area which will, in time, create a forested condition which will provide a buffer from Mr. Woodsen's home and other valuable environmental benefits.

CONCLUSION:

Under Section 267-51 of the Code, special exceptions may be granted when determined to be compatible with the uses permitted as of right in the appropriate district by the Code.

Section 267-53(A)(2) of the Code provides as follows:

“Country Clubs, Golf Clubs, Tennis and Swim Clubs. These uses may be granted in the AG, R, RR, R-1, R-2, R-3, R-4 and GI districts, provided that:

- (a) No off street parking or loading area shall be located within any required yard or within 25 feet of any parcel boundary.**
- (b) Off street parking and loading areas, swimming pools and tennis courts shall be screened from adjacent residential lots.**
- (c) The principle access shall be provided from an arterial or collector road.**
- (d) No more than 20% of land area upon which such use is conducted may be located in the GI District.**
- (e) Any outside lighting used to illuminate a use permitted under this section shall be designed, installed and maintained in a manner not to cause a glare or reflection on adjacent residential lots.”**

Section 267-53(F)(5) of the Code provides:

“Country inns and resorts. These uses may be granted in the AG, RR, R, R1, R2, R3, R4, RO, and VR Districts, provided that:

- (a) The country inn or resort shall provide eating and sleeping facilities for at least three (3) guests on a daily or weekly short-term basis.**
- (b) The project shall be responsive to the natural and historic features of the parcel.**
- (c) Any historic structures renovated and used shall be subject to review by the Historic District Commission.”**

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Section 267-41(D), Natural Resource District, provides:

“Purpose. The intent of this overlay district is to preserve significant/special environmental features identified herein and to:

- (a) Provide uniform guidelines for orderly development and use of land within the Natural Resources District to protect the ecology of the area.**
- (b) Protect steep terrain.**
- (c) Protect water quality in streams and rivers.**
- (d) Minimize erosion/siltation and protect essential vegetation.**
- (e) Protect non-tidal wetlands.**
- (f) Protect persons and property from environmental hazards such as erosion, siltation and flood waters.**

Section 267-41(D)(2)(c) of the Code provides that the Natural Resources District area for stream protection shall be a minimum distance of one hundred fifty (150) feet on both sides of the center line of a stream or fifty (50) feet beyond the one-hundred-year floodplain, whichever is greater and along their tributaries for a minimum of seventy-five (75) feet on both sides of the center line of the tributary.

Section 267-41(D)(4)(b) and (5)(b) of the Code provides that a buffer be provided along streams to be fifty (50) feet, plus four (4) feet for each one-percent increase in slope, measured from the water’s edge.

Section 267-41(D)(5)(e) of the Code provides as follows:

“Non- tidal wetlands shall not be disturbed by development. A buffer of at least 75 feet shall be maintained in areas adjacent to wetlands.”

Section 267-41(D)(6) of the Code provides as follows:

“Variances. The Board may grant a variance to subsection (D)(3), (4) or (5) of the Natural Resources District regulations upon a finding by the Board that the proposed development will not adversely affect the Natural Resources District. Prior to rendering approval, the Board shall request advisory comments from the Zoning Administrator, the Soil Conservation Service and the Department of Natural Resources.”

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Section 267-11 of the Code authorizes the granting of variances, provided the Board finds that:

1. By reason of the uniqueness of the property or topographical conditions literal enforcement of Part 1 will result in practical difficulty or unreasonable hardship; and
2. The variance will not be substantially detrimental to adjacent properties and will not materially impair the purposes of this Part 1 or the public interest.

The concept of uniqueness in variance cases was discussed by the Court of Special Appeals in the case of North v. St. Mary's County, 99 Md. App. 502, 638 A.2d 1175 (1994) wherein the court stated:

“In the zoning context the “unique” aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. “Uniqueness” of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

An example of uniqueness is found in the use variance case of Frankel v. Mayor and City Council, 223 Md. 97, 104 (1960), where the court noted: “He met the burden; the irregularity of the...lot...that it was located on a corner of an arterial highway and another street, that it is bounded on two sides...by parking lots and public...institutions, that immediately to its south are the row houses...” Id. at 638 A.2d 1181.

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It is generally recognized that a confluence or combination of factors may be considered in determining whether a property is unique. Kilmartin v. Board of Zoning and Adjustment, 579 A.2d 1164 (D.C. App. 1990). The courts have also held that unique characteristics of the property that justify a variance are not limited to those that inure to the land in particular, Capitol Hill Restorations Society v. District of Columbia Board of Zoning and Adjustment, 534 A.2d 939 (DC 1987), but that the use of adjoining and surrounding lands may also be considered. Valley View Civic Association v. Zoning Board of Adjustment, 462 A.2d 637 (DC 1983). Uniqueness does not require a property to be the only property with these characteristics. However, the conditions must be sufficiently rare so that, if all similarly situated properties in the district receive variances, the district would remain materially unchanged. Rathkopf, The Law of Planning and Zoning, Section 38.03 (1988).

The Court of Appeals of Maryland in McLean v. Soley, 270 Md. 208, 310 A.2d 783 (1973) held that the following criteria are to be used for determining whether “practical difficulty” has been established:

1. Whether strict compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the use of the property for a permitted purpose or render conformity with such restrictions unnecessarily burdensome.
2. Whether a grant of the variance applied for would do substantial justice to the applicant as well as other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Under Maryland law, the special exception use is part of the comprehensive zoning plan sharing the presumption, that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption.

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The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely effected and whether the use in a particular case is in harmony with the general purpose and intent of the plan. Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1325 (1981).

While the applicant in such a case has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements of the zoning code, he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely effect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material; but if there is not probative evidence of harm or disturbance in light of the nature of the zoning involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for special exception is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-551 (1973). The appropriate standard to be used in determining whether a requested special exception use should be denied is whether there are facts and circumstances that show the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. See Schultz at 432 A.2d 1327.

Such facts and circumstances must be strong and substantial to overcome the presumption that the proposed use be allowed in the district. Anderson v. Sawyer, 23 Md. App. 612, 329 A.2d 716, 724 (1974).

In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995), the Court of Special Appeals said:

“In other words, if it must be shown, as it must be, that the adverse effects at the particular site are greater or “above and beyond”, then it must be asked, greater than what? Above and beyond what? Once an applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that that impact, however severe at a given location, is greater at that location than elsewhere. (emphasis supplied)

Thus, the Court of Special Appeals emphasized that once the applicant shows that it

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meets the requirements for the special exception under statute, the burden then shifts to the protestants to show that impacts from the use at a particular location are greater at this location than elsewhere. If the protestants fail to meet that burden of proof, the requested special exception must be approved.

The unrebutted and uncontradicted evidence presented clearly shows that the Applicant met his burden of proof to justify the granting of the requested special exceptions. The evidence presented by Denis Canavan and through the Staff Report confirms that the Applicant meets or exceeds every Code requirement regarding the proposed golf course and resort with the exception of the NRD variance and the minor area variance. The testimony of Wes Guckert showed that approval of the project would not cause adverse traffic impacts. Most of the project will constitute open green space. No objectionable odors, glare, noise or other impacts will result from the project.

The evidence also showed that any impacts from the project would not be significantly different in character or intensity from the effects inherent in the operation of a resort, golf course, clubhouse, golf driving range, irrespective of their location in the AG zone and the R2 zone. Impacts from the proposed golf course would be less than those normally associated with golf courses with night operations. Night operation will not take place here. The golf course will only be used weather permitting. No evidence was presented by the protestants which would rebut that presented by the Applicant. The only concern articulated by the protestants regarding the project was over forest removal. However, Mr. Hertsch testified that removal of the forest would not cause adverse impacts and was in compliance with all applicable forest retention standards. Thus the tests set forth in Schultz and Mossburg has been met.

The unrebutted evidence from Mr. Bergmann and the Staff Report showed that the Applicant met his burden of proof to justify the granting of the requested variance to disturb the Natural Resource District, NRD buffer and stream buffer. Unlike the typical NRD disturbance which is permanent and usually involves creation of impervious surfaces, the disturbances here primarily involve changes from one type of vegetative community to the other. Very little impervious surfaces will be created. The turf grass will filter surface water runoff better than agricultural, residential or industrial development. NRD impacts are

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unavoidable but have been limited as much as possible. Mitigation measures will be implemented and all work on the project will be performed pursuant to applicable permits. The purpose of the NRD is to avoid impacts to water quality in streams and rivers, protect non-tidal wetlands, minimize erosion/siltation and avoid other environmental hazards. The evidence clearly showed that these impacts will not occur. Granting the variances will not adversely affect the Natural Resources District.

The Applicant has met his burden of proof to justify the variance from the fifty (50) foot minimum building or use setback. The Hearing Examiner finds that based on the evidence, the subject property is unique due to configuration, topography, non-tidal wetlands and location. Most of the property is open space golf course. Mr. Hertsch testified that it would be impossible to redesign the golf course in order to meet the 50 foot building or setback requirements without adversely impacting the golf course design. Furthermore, there is no justification to redesign the golf course when the adjacent residential lot is unbuildable and the owners of any future residential lots will want to adjoin the golf course. The fifty (50) foot building or use set-back variance would not cause any adverse impact. No structures, only fairways and rough would be located in that area.

Under McLean v. Soley, denial of the variance would result in practical difficulty to the Applicant; denial would unreasonably prevent the use of the subject property for a permitted purpose, i.e., a golf club and resort. It would be unnecessarily burdensome to require the Applicant to comply with the Code under these circumstances. The evidence clearly shows that the requested variance will not be detrimental to adjoining properties and will not materially impair the purpose of the Code.

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Therefore, the Hearing Examiner recommends that the requested special exception for a golf course and resort, including hotel and conference center and accessory uses, variances to impact the NRD and a variance from the fifty (50) foot minimum building or use setback be granted subject to the following conditions:

1. Approval of the Special Exception for the resort/conference center is conditioned upon the provision of access to the site from either the proposed Barker Lane access to MD 155 or from U.S. Route 40 as shown on the site plans submitted with the application. Access from Chapel Road shall be permitted, provided that either the entrance from U. S. Route 40 or MD Route 155 are established.
2. The Applicant shall submit a site plan through the Development Advisory Committee (DAC) for review. The site plan shall generally conform to plans presented to the Board. Minor changes may be approved by the Director of Planning and Zoning. The plan shall include detailed wetland and buffer delineations.
3. The amount of NRD disturbance shall be minimized wherever possible during final design of the golf course.
4. A mitigation plan shall be submitted for review and approval by the Department of Planning and Zoning. This plan must quantify the amounts of wetlands disturbed (piped and converted), the amount of forest buffer disturbed, and the amount of non-forested buffer disturbed in the final design of the project. The mitigation plan shall include the proposed re-vegetation in the disturbed NRD areas and demonstrate how runoff will be controlled on-site. This plan should also address how fertilizer/pesticides shall be controlled and prevented from entering Gasheys Creek and other water bodies. The mitigation plan shall be submitted along with the Forest Conservation plan for the site.
5. A detailed lighting plan and landscaping plan shall also be submitted for review and approval by the Department of Planning and Zoning. Lighting should be directed so as not to impact adjacent properties.

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- 6. The Applicant shall obtain all required permits from the Army Corps of Engineers and the Maryland Department of the Environment.**
- 7. The Applicant shall obtain all necessary permits, approvals, and inspections for the golf course and resort/conference center.**

Date APRIL 29, 1999

**L. A. Hinderhofer
Zoning Hearing Examiner**